

STATE OF MICHIGAN
IN THE SUPREME COURT

WILLIAM MILLER,

Plaintiff-Appellee,

Supreme Court
Docket Nos. 134393 & 134406
COA Docket No. 259992
LC Civil Action No. 03-325030-NF

v

ALLSTATE INSURANCE COMPANY,

Defendant/Cross-Defendant/Appellant,

-and-

PT WORKS, INC.,

Cross-Plaintiff/Appellee.

AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF
AMERICAN INSTITUTE OF ARCHITECTS MICHIGAN,
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF MICHIGAN AND
MICHIGAN SOCIETY OF PROFESSIONAL ENGINEERS

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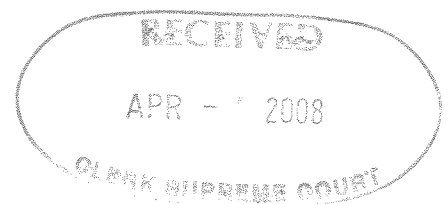


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STATEMENT OF ORDER APPEALED FROM

Amici challenge the new rule of law announced in *Miller v. Allstate*, 275 Mich. App. 649; 739 N.W.2d 675 (2007), that businesses providing services listed as “professional services” pursuant to MCL 450.222(c) are prohibited from incorporating under the Business Corporation Act, and must incorporate under the Professional Services Corporation Act. The specific ruling at issue is stated by the *Miller* Court as follows:

“Section 251(1) of the BCA provides:

A corporation may be formed under this act for any lawful purpose, except to engage in a business for which a corporation may be formed under any other statute of this state unless that statute permits formation under this act.
[MCL 450.1251(1).]

In light of this language, our question is whether PT Works was formed to engage in a business for which a corporation may be formed under the PSCA, and, if so, whether the PSCA nonetheless permitted formation under the BCA. We conclude that PT Works was improperly incorporated under the BCA.

Pursuant to the PSCA, “[o]ne or more licensed persons may organize under this act to become a shareholder or shareholders of a professional corporation for pecuniary profit.” MCL 450.224(1). The PSCA defines “professional corporation” as “a corporation that is organized under this act for the sole and specific purpose of rendering 1 or more professional services and has as its shareholders only licensed persons, the personal representatives or estates of individuals, or other persons as provided in section 10.” MCL 450.222(b). MCL 450.222(c) provides:

“Professional service” means a type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. Professional service includes, but is not limited to, services rendered by certified or other public accountants, chiropractors, dentists, optometrists, veterinarians, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, **architects, professional engineers**, land surveyors, and attorneys at law.

The plain language of the statute indicates that the list of professional services identified is not exclusive. And there can be no dispute that physical therapy services for injured or sick individuals is a type of personal service offered to the public. Moreover, engaging in the practice of physical therapy requires a license under Michigan law. *MCL 333.17820*. Accordingly, physical therapy constitutes a professional service for purposes of the PSCA, and thus the business of providing physical therapy services also constitutes "a business for which a corporation may be formed under any other statute of this state." *MCL 450.1251(1)*. Additionally, the PSCA does not expressly permit formation under the BCA. *MCL 450.1251(1)*. [FN omitted] Moreover, the BCA provides that professional service corporations formed under the PSCA "shall not be incorporated under this act." *MCL 450.1123(1)*. Therefore, PT Works was improperly incorporated under the BCA. We also note that, given that PT Works' incorporators and shareholders are not licensed physical therapists, those particular individuals could not incorporate PT Works nor could they be shareholders under the PSCA. *MCL 450.222(b)*; *MCL 450.224(1) and (2)*." [Emphasis added] **Miller** at 652-654

Amici argue that the Court in *Miller* erred in that the PSCA does permit formation under the BCA, by virtue of the fact that it lacks any prohibition against formation under the BCA. Further, specifically as to architectural and engineering firms, the established practice at the time of enactment of the PSCA clearly permitted formation under the BCA, a right expressly granted by statute.

The Court also erred in interpreting Section 1123, because that section merely prohibits dual incorporation under both acts, and is not a prohibition against incorporation under the BCA.

QUESTIONS PRESENTED

- I. WHETHER ALL INDIVIDUALS REQUIRED TO HOLD A MICHIGAN LICENSE TO PRACTICE A PROFESSION LISTED IN MCL 450.222(c) ARE PROHIBITED FROM INCORPORATING UNDER THE GENERAL BUSINESS CORPORATION ACT AND ARE INSTEAD REQUIRED TO INCORPORATE UNDER THE PROFESSIONAL SERVICES CORPORATION ACT?**

Amici AIA/ACEC/MSPE answer: “NO”

Court of Appeals answered: “YES”

PT Works answers: “NO”

Allstate answers: “YES”

- II. IN THE EVENT THIS COURT AFFIRMS THE COURT OF APPEALS ANNOUNCEMENT OF A NEW RULE OF LAW, THAT ALL INDIVIDUALS REQUIRED TO HOLD A MICHIGAN LICENSE TO PRACTICE A PROFESSION LISTED IN MCL 450.222(c) ARE PROHIBITED FROM INCORPORATING UNDER THE GENERAL BUSINESS CORPORATION ACT AND ARE INSTEAD REQUIRED TO INCORPORATE UNDER THE PROFESSIONAL SERVICES CORPORATION ACT, SHOULD THE SUPREME COURT EXERCISE ITS DISCRETION TO AVOID INJUSTICE AND LIMIT APPLICATION OF THE NEW RULE OF LAW?**

Amici AIA/ACEC/MSPE answer: “YES”

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are incorporated professional organizations, comprised of individuals licensed under the Occupational Code of Michigan, **MCL 339.2001 et. seq.** and their associates, who provide architectural and engineering services in Michigan. All three Amici represent interests that have been significantly and adversely impacted by the new rule of law announced by the Court of Appeals in ***Miller v. Allstate*, 275 Mich. App. 649; 739 N.W.2d 675 (2007)**. Specifically, Michigan architects and engineers (“A/E’s”) have historically been afforded the right to incorporate under either the Michigan Business Corporation Act (“BCA”) or the Professional Services Corporation Act (“PSCA”). Over the last century, many, many Michigan A/E firms have relied on established law and have chosen to incorporate under the BCA. As permitted under the BCA, many of these firms also have non-licensed shareholders, now constituting a large class of persons with vested ownership interests and representing considerable economic investment.

By its terms, the new rule announced in the ***Miller*** decision applies to all professions listed in **MCL 450.222(c)**, specifically including architects and engineers. The ***Miller*** decision caused the Department of Labor and Economic Growth, on July 23, 2007, to reverse its long-established practice of endorsing filings from A/E’s under the BCA. Further, the new rule as announced in ***Miller*** would logically extend to all architectural and engineering firms incorporated in Michigan since March 28, 1963, the date the PSCA became effective. Presumably, any A/E firms incorporated under the BCA are currently practicing “illegally,” and the large number of existing shareholders of Michigan A/E firms that are not licensed are holding their shares “illegally.” Accordingly, the new rule of law

announced by **Miller** has created uncertainty in the legal environment for a large percentage of Michigan's A/E firms, placed significant vested interests in jeopardy and is causing Michigan's design professionals to suffer a competitive disadvantage.

Amici concur in the analysis offered by the Michigan Attorney General and the State Bar of Michigan Business Law section, in that the PSCA does not by its plain terms state, nor did the Legislature intend, to require incorporation under the PSCA, with the possible exception of those professions deemed "learned professions" at the time the PSCA was enacted. The Legislature never intended the PSCA to be the exclusive corporate form for A/E's. The restriction of rights announced by **Miller**, and the imposition of the requirements of the PSCA upon all corporations providing architectural and engineering is unwarranted and disruptive, and does not serve to protect public health safety and welfare in any manner whatsoever.

Amici urge the Court to reverse the **Miller** Court and find, consistent with the both the plain words of the statute and the clear intent of the Legislature, that all "professional services" listed in **MCL 450.222(c)** are not required to form under the PSCA but may also form under the BCA, because the PSCA does permit such formation. Further, for this same reason, Plaintiff/Appellee PT Works was lawfully incorporated under the Michigan Business Corporation Act. In the alternative, Amici urge the Court consider the vast unintended consequences of affirming **Miller**, and exercise its discretion to limit application of this new rule of law. Amici pray the Court, at minimum, limit the **Miller** decision to its facts and/or limit the effect of the decision to prospective application.

American Institute of Architects, Michigan

Amicus curiae American Institute of Architects, Michigan (“AIAMI”) is a corporate entity that is organized pursuant to, and relies for its existence upon, the laws of the State of Michigan. AIAMI is the 1,600-member state affiliate of the American Institute of Architects (“AIA”), a national organization headquartered in Washington, D.C. of more than 83,500 members throughout the United States. AIAMI holds as its purpose and goals the advancement of the architectural profession, the improvement of the built environment, and the enhancement of the quality of life of the Michigan citizenry to the extent that life is impacted by the built environment.

AIAMI and its members have a significant interest in the principled, reliable, predictable and harmonious application of Michigan law as it relates to the formation of firms organized for the purpose of providing architectural services in this state, and to secure stability in that law. AIAMI submits this Amicus Curiae brief in furtherance of this purpose.

American Council of Engineering Companies of Michigan

Amicus curiae American Council of Engineering Companies of Michigan, Inc. (“ACECMI”), is a corporate entity organized and existing under the laws of the State of Michigan. ACECMI is comprised of 106 member firms, and is the state affiliate of the American Council of Engineering Companies (“ACEC”), a national organization headquartered in Washington, D.C. of more than 5,500 engineering firms throughout the United States. ACECMI seeks to advance the engineering profession and to improve the quality of life for Michigan citizens insofar as they are affected by public and private civil, electrical, mechanical and structural engineering projects.

ACECMI and its member engineering firms have a significant interest in the principled, reliable, predictable and harmonious application of Michigan law as it relates to the formation of firms organized for the purpose of providing engineering services in this state, and to secure stability in that law. ACECMI submits this Amicus Curiae brief in furtherance of this purpose.

Michigan Society of Professional Engineers

Amicus curiae Michigan Society of Professional Engineers Engineering Companies of Michigan, Inc. ("MSPE"), is a non-profit corporate entity organized and existing under the laws of the State of Michigan, and is the state affiliate of the National Society of Professional Engineers, an organization of over 45,000 members and headquartered in Alexandria VA. MSPE was organized in 1946 with its stated purpose being the advancement of the public welfare and the promotion of the professional social and economic interests of the professional engineer and the engineer in training. MSPE's mission is to promote the ethical, competent practice of engineering, advocate licensure, and enhance the image and well-being of its members. MSPE is the recognized voice and advocate of licensed professional engineers in Michigan.

MSPE and its members have a significant interest in the principled, reliable, predictable and harmonious application of Michigan law as it relates to the formation of firms organized for the purpose of providing engineering services in this state, and to secure stability in that law. MSPE submits this Amicus Curiae brief in furtherance of this purpose.

STANDARD OF REVIEW

This case presents questions requiring statutory interpretation as well as review of a grant or denial of Summary Disposition. This Court reviews both questions de novo. **Omelenchuk v City of Warren**, 466 Mich. 524, 527; 647 N.W.2d 493 (2002) (questions involving interpretation of statute); **American Federation of State, Co & Municipal Employees v Detroit**, 468 Mich. 388, 398; 662 N.W.2d 695 (2003) (questions involving the grant or denial of a motion for summary disposition).

STATEMENT OF FACTS

For its statement of underlying facts and proceedings, Amici accept the Statement of Facts filed by Cross-plaintiff-Appellant P.T. Works, Inc.

ARGUMENT

I. **ALL INDIVIDUALS REQUIRED TO HOLD A MICHIGAN LICENSE TO PRACTICE A PROFESSION LISTED IN MCL 450.222(c) ARE NOT PROHIBITED FROM INCORPORATING UNDER THE GENERAL BUSINESS CORPORATION ACT AND ARE NOT REQUIRED TO INCORPORATE UNDER THE PROFESSIONAL SERVICES CORPORATION ACT, AS THE COURT OF APPEALS RULED**

I(a) AMICI AIA/ACEC/MSPE CONCUR IN THE ANALYSIS OF THE MICHIGAN ATTORNEY GENERAL AND THE BUSINESS LAW SECTION OF THE STATE BAR OF MICHIGAN REGARDING THE HISTORY OF THE LAW OF CORPORATE PRACTICE BY “LEARNED” PROFESSIONALS

The history of the law regarding the corporate practice of “learned” professions as set forth by the Michigan Attorney General¹ and the Business law Section of the State Bar of Michigan² accurately describe the law in relation to the “learned professional” doctrine, the context in which it developed and the application of the law in practice. Amici concur in the arguments set forth therein, and concur that the PSCA does not require professional service providers to incorporate exclusively under the PSCA. Amici urge the Court to reverse the decision of the Court of Appeals accordingly.

I(b) THE ANALYSIS OF THE COURT OF APPEALS IN *MILLER* IS INAPPLICABLE TO THE PROFESSIONS OF ARCHITECTURE AND ENGINEERING IN MICHIGAN

II(b)(1) Overview: the *Miller* Court Was Presented Only a Narrow Question Concerning the Practice of Physical Therapy, but Created a New Rule of Law Restricting the Corporate Practice of Architects and Engineers to Professional Services Corporations

Until May 31, 2007, Michigan’s licensed architects and professional engineers were

¹ AG Brief, Argument II., at Section II.(B) and (c).

² Business Law Section Brief, Law and Analysis Section I., at Sections I(A)-(D).

afforded the right to incorporate either under the BCA or the PSCA. The Court of Appeals overreached in its opinion and has created a new rule of law the Legislature never intended, specifically that all “professional services” providers in Michigan must incorporate under the PSCA and may not form under the BCA. The new rule has set in motion serious and unintended consequences for A/E’s. The Court has created this new rule without the benefit of contested advocacy by the interested parties, including the A/E’s, on the issue upon which it ruled.

On remand, the Court of Appeals was presented a narrow question by the Supreme Court:

“[W]e REMAND this case to the Court of Appeals to determine whether PT Works may properly be incorporated solely under the Business Corporations Act and not the Professional Services Corporations Act, and, once that determination is made, to reconsider (if necessary) whether physical therapy provided by PT Works was “lawfully rendered” under *MCL 500.3157*.” ***Miller v. Allstate***, 477 Mich. 1062; 728 N.W.2d 458 (2007)

The ***Miller*** Court found that PT Works was not properly formed under the BCA. In order to reach that conclusion, the Court determined that the professions listed in, or contemplated by **MCL 450.222(c)** are required to incorporate under the PSCA and not the BCA. The Court proceeded rule that PT Works was the among the types of “professional services” encompassed by **MCL 450.222(c)**, and therefore, PT Works must incorporate under the PSCA and may not incorporate under the BCA. The Court of Appeals did not limit its ruling to the facts or parties before the Court, although the ruling obviously has expansive implications. The unavoidable affect of the broad ruling is that the Court’s decision applies to all the professions listed within **MCL 450.222(c)**.

Two of the professions expressly defined in **MCL 450.222(c)** as “professional services” are “architecture” and “professional engineering.”:

§ 450.222. Definitions.

(c) "Professional service" means a type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. Professional service includes, but is not limited to, services rendered by certified or other public accountants, chiropractors, dentists, optometrists, veterinarians, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, **architects, professional engineers**, land surveyors, and attorneys at law. [Emphasis added]

Therefore, in ruling that all the listed professions must incorporate exclusively under the PSCA, the **Miller** Court altered long-standing law and practice for Michigan's architects and professional engineers, and stripped from A/E's a long-held statutory right by judicial fiat. The Court did so without the benefit of allowing the architects and engineers an opportunity to be heard. There are many factors relative to A/E's, including the history of the law and statutes regulating A/E practice, not analyzed by the Court, that must be considered before an informed ruling can be made.

In direct response to **Miller**, on July 23, 2007, the Department of Labor and Economic growth, Corporation Division issued a notice that:

“In *Miller v Allstate*, decided May 31, 2007, the Michigan Court of Appeals held that if a corporation can be formed under the Professional Services Corporation Act, it may not form under the Business Corporation Act.

Corporations providing services within these categories are required to form under the Professional Services Corporation Act.

Architects

Professional engineers

*** ”

Therefore, A/E's may no longer choose to incorporate under the BCA in Michigan. Existing corporations practicing architecture and engineering as general corporations are suddenly facing uncertainty as to the legality of their practice, and the disposition of shares held by non-licensees. In deciding on the propriety of the specific corporate form of PT Works, an entity offering physical therapy, the Court of Appeals profoundly impacted the practice of architecture and engineering in Michigan.

I(b)(2) The Development of the Law of Corporate Practice by Michigan A/E's is Unique, and Differs Substantially from Both Medical Corporate Practice and the Practice of Physical Therapy.

On March 31, 1903, the firm of Field, Hinchman & Smith was incorporated under Michigan's General Business Corporation Act³. The stated purpose of the firm under its corporate Article II was "General engineering and architectural work and contracting."⁴ The Department endorsed the filing and FH&S thereafter conducted business providing A/E services in Michigan through a corporate form. The firm, of course, became Smith, Hinchman & Grylls⁵ and would soon design many of Michigan's architectural landmarks of the Twentieth Century, including the Penobscot Building and Guardian Building in Detroit.

The importance of the above example is that, during this same historical period,

³ Public Act 154 of 1901.

⁴ DLEG Corporation database, at www.dleg.state.mi.us/bcs_corp/sr_corp.asp.

⁵ Re-incorporated in 1979 as the Smith Group, Inc. *Id.*

physicians, dentists, and lawyers were considered “professions” and were prohibited from corporate practice, but A/E’s were not. “Law, medicine and dentistry are generally considered as learned professions.” *People v. Carroll*, 274 Mich. 451, 454; 264 N.W. 861; 1936 [T]he general rule is that it is within the police power of the State to impose reasonable regulations relative to the professions of law, medicine and dentistry. *Carroll*, at 456. In contrast, architects and engineers were not restricted from corporate practice and were free to provide A/E services to the public through a corporation.

Michigan did soon begin to regulate architectural practice, instituting the first regulations in 1915,⁶ and later enacting a licensing statute with testing requirements by 1937.⁷ However, the regulation of architecture did not alter the existing law relative to corporate practice. Michigan architects and engineers remained entitled to incorporate their professional practices. The 1937 statute expressly granted the right of incorporation, pursuant to a condition that all officers and directors, but not shareholders, be licensees:

Section 338.567. Rights of firms, co-partnerships, corporations or joint stock associations to practice; limitations.

Sec. 17. An architectural or an engineering or a land surveying firm, or a co-partnership, or a corporation, or a joint stock association may engage in the practice of architecture, professional engineering, or land surveying in this state: Provided, That all partners, officers, and directors of such organizations shall be registered architects, registered professional engineers, or registered land surveyors.

The licensing of architects did not serve to change the status of architects for purposes of corporate law, or place architects into the category of “learned professions”

⁶ Michigan was the 10th state in the Union to institute regulation of architecture.

⁷ Public Act 240 of 1937, eff. January 1, 1938.

prohibited from incorporating. Accordingly, although now governed by a licensing statute, A/E's continued to incorporate in Michigan.

As fully explained by the Attorney General and Business Law Section of the State Bar, the PSCA⁸ was enacted in 1962 for the purpose of allowing the traditional "learned professions" to engage in corporate practice. The PSCA became effective on March 28, 1963, and had no effect on the practice of A/E's incorporating under the BCA.

In 1968, Attorney General Frank Kelly issued his AG Opinion No. 4627 (Discussed further, below) which confirmed the right of A/E's to incorporate under the BCA. Since then, A/E's have relied on **OAG No. 4627** in continuing to choose to incorporate under either the BCA or the PSCA. Later, after **MCL 450.1123** and **MCL 450.1251**⁹ were enacted, A/E's still continued to incorporate under the BCA.

In fact, the Department's PSCA filing guidelines, entitled "**Review procedures for C&S 501 - Articles of Incorporation for Professional Service Corporations (Rev. 4/97)**", contain paragraph 10 which states in pertinent part:

"A list of professions which can be incorporated under either the professional Service Corporation Act or the Business Corporation Act are (this list is not all inclusive):

Architects

Professional Engineers

***"

Therefore, the history of the law and its application relative to corporate practice by

⁸ Public Act 192 of 1962, MCL 450.221 et. seq.

⁹ The sections of the BCA relied upon by the **Miller** Court.

architects and engineers in Michigan, through the statutory language and common practice, evidences a clear and consistent reflection of Legislative intent that A/E's are entitled to incorporate under the BCA. Specifically, A/E's were never considered "learned professionals" or prohibited from corporate practice under Michigan law, and have been incorporating in Michigan under the general Business Corporation Act for at least a century. The practice of incorporation of A/E's was unaffected by the advent of licensing, with the licensing statute itself expressly granting the right to incorporate in **MCL 338.567** (repealed). The law and practice were unaffected by the enactment of the PSCA, which was correctly analyzed by the Attorney General in 1968 as merely permissive to A/E's.

The practice of A/E's incorporating under the BCA continued up to July 23, 2007, when the Department suspended the practice, in direct response to **Miller**.

I(b)(3) The Language of the Statute Sections at Issue is Clearly Permissive as Applied to Architects and Engineers, and Therefore the PSCA "Permits" A/E's to Incorporate Under the BCA

This argument section addresses the **Miller** Court's statutory interpretation as it relates to A/E practice. Persons must be licensed to practice architecture and professional engineering in Michigan, so it is acknowledged that A/E's can form under the PSCA, provided each shareholder is appropriately licensed. The language of the relevant sections of the PSCA are set forth in entirely permissive terms:

§ 450.224. Professional corporation for pecuniary profit; organization; shareholders to be licensed; rendering of professional services; legal authorization; licensed person of another jurisdiction.

Sec. 4. (1) One or more licensed persons may organize under this act to become a shareholder or shareholders of a professional corporation for pecuniary profit.

(2) Except as otherwise provided in subsection (3) or otherwise prohibited, a professional corporation may render 1 or more professional services, except that each shareholder must be a licensed person in 1 or more of the professional services rendered by the corporation. ***

There is no language anywhere in the PSCA that imposes a requirement that architects and engineers *must* incorporate under the PSCA. There is no prohibitive language of any kind relative to the BCA. In practice, A/E's continued to incorporate under the BCA both before and the enactment of the PSCA.

In 1968, four years after enactment, the question was presented to Michigan's Attorney General whether individuals required to hold a Michigan license to practice architecture or engineering are prohibited from incorporating under the general business corporation act, and are instead required to incorporate under the professional services corporation act? The attorney General, in a well-reasoned opinion, stated:

"There is no requirement in the professional service corporation act that all professional service corporations be incorporated under the act to the exclusion of the general corporation act, and therefore architects, engineers and land surveyors continue to have the privilege of incorporating under the general corporation act or the professional services corporation act." **OAG, 1967-1968, No. 4627, p 264 (June 26, 1968)** [emphasis added]

While AG opinions are not binding precedent, the reasoning of **OAG No. 4627** is persuasive. If the Legislature intended to divest A/E's of a right they had enjoyed for decades, there would have been some provision contained in the PSCA to express that significant change in the law. The AG Opinion correctly found no language to evidence such an intent, and none exists.

Significantly, the 1968 AG Opinion recognized a continuing right that already existed in A/E's to incorporate under the BCA. In contrast, Michigan law previously held that "physicians, dentists and lawyers" were the only "learned professions" prohibited from corporate practice, *Carroll*, supra, and the Legislature was surely aware of that law when it enacted the PSCA. "[I]t is a well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation." *Ford v. Woodhaven*, 475 Mich. 425; 716 N.W.2d 247 (2006). Without an express prohibition against formation under the BCA in the PSCA, the statutory language, which is clearly and unambiguously permissive, must be given its ordinary meaning, which is permissive, not mandatory.

Critical to the *Miller* Court's analysis was the contrary interpretation it applied to BCA section 450.1251.

§ 450.1251. Formation of corporation for lawful purpose; exception; aiding national emergency.

Sec. 251. (1) A corporation may be formed under this act for any lawful purpose, except to engage in a business for which a corporation may be formed under any other statute of this state unless that statute permits formation under this act.

The *Miller* Court found, "[T]he PSCA does not "expressly permit" formation under the BCA. MCL 450.1251(1)." This led the Court to reason that since the PSCA did not expressly permit formation under the BCA, any corporation that may be formed under the PSCA may not be formed under the BCA. A/E's may certainly form under the PSCA, but given the particular history of A/E corporate practice in Michigan, it cannot reasonably be said the PSCA did not permit incorporation of A/E's under the BCA at the time of

enactment. Then-current **MCL 338.567** expressly granted the right of incorporation to A/E's, and did not require all stockholders or shareholders to be licensees. Therefore, **MCL 450.1251** does not support the Miller Court's decision, especially as it relates to A/E's.

Therefore, holding that A/E's cannot be incorporated in Michigan unless all stockholders or shareholders are licensees renders that language of **MCL 338.567** nugatory, something the Court cannot properly do.

I(b)(4) The Protection of Public Health Safety and Welfare Relative to the Practice of Architecture and Engineering in Michigan is Governed by The Occupational Code, Not the PSCA

Michigan's current Occupational Code provides:

§ 339.2010. Rights of firms to practice, limitations; approval by department of certain practice; information requested by department; person of responsibility in charge of each place of business, field office exception.

Sec. 2010. (1) A firm may engage in the practice of architecture, professional engineering, or professional surveying in this state, if not less than 2/3 of the principals of the firm are licensees.

(2) However, a nonlicensed principal and the principal's firm shall apply for and receive an approval from the department to engage in the practice of architecture, professional engineering, or professional surveying, if the conduct of the firm and its principals comply with rules promulgated by the department.

(3) Upon request by the department, a firm shall report to the department the names and addresses of its principals, persons in responsible charge, unlicensed principals, and any other information the department considers necessary.

(4) A firm shall employ a person in responsible charge in the field of services offered at each place of business in this state where services are offered by the firm, except at a field office which provides only a review of construction.

The "public policy" argument that all professional service providers must be formed

under the PSCA in order to protect the public health safety and welfare simply does not apply to architecture and engineering firms. Not only is there no textual support for that argument in the PSCA or BCA, but A/E firms are required under **MCL 339.2010** to be operated by a super-majority of licensees, and are subject to approval and reporting requirements of the Department. The Occupational Code is the governing law protecting public health safety and welfare as it relates to the practice of architecture and engineering, not the business formation statutes. Further, A/E's are subject to personal liability for professional negligence and incorporation under the BCA has never served to avoid that responsibility.

II. IN THE EVENT THIS COURT AFFIRMS THE COURT OF APPEALS ANNOUNCEMENT OF A NEW RULE OF LAW, THAT ALL INDIVIDUALS REQUIRED TO HOLD A MICHIGAN LICENSE TO PRACTICE A PROFESSION LISTED IN MCL 450.222(c) ARE PROHIBITED FROM INCORPORATING UNDER THE GENERAL BUSINESS CORPORATION ACT AND ARE INSTEAD REQUIRED TO INCORPORATE UNDER THE PROFESSIONAL SERVICES CORPORATION ACT, THE SUPREME COURT SHOULD EXERCISE ITS DISCRETION TO AVOID INJUSTICE AND LIMIT APPLICATION OF THE NEW RULE OF LAW

II(a) THERE HAS BEEN EXTENSIVE RELIANCE BY A/E'S ON THE FORMER PRACTICE AND UPON OAG NO. 4627

Since 1963, A/E firms throughout the state have relied on the former practice and specifically upon OAG 4627. In business formation matters, A/E's have consulted legal counsel that have provided advice in relation to the long-standing practice in Michigan, permitting A/E's to freely choose between formation under the BCA or the PSCA. The result is that during the last 45 years a considerable number of firms have chosen to incorporate under the BCA, and in addition have included non-licensees as shareholders or stockholders in those firms. Supporting the extent of reliance in the industry, **Exhibit A** provides the affidavits of 6 persons of prominence in the A/E industry:

1. Ron W. Brenke, P.E., is the Executive Director/Secretary of ACEC of Michigan, a 106-firm organization;
2. Stephen Smith, AIA is President of AIA Michigan, with 1600 members;
3. Jim Page, P.E., is Corporate Secretary for HarleyEllis/Deveraux, a Michigan A/E firm with 450 employees and 120 shareholders;
4. James A. Susan, P.E., is Senior Vice-President of Fishbeck, Thompson, Carr & Huber, Inc., a Michigan A/E firm with 340 employees and 190 shareholders;
5. Mark K. Kramer, P.E., is President and Chairman of the Board of Soils and Materials Engineers, Inc., a Michigan Engineering firm with 200 employees

and 71 shareholders;

6. Lawrence J. Fleis, P.E., is President of Fleis & vandenBrink Engineering, Inc., an A/E firm with 100 employees and 43 shareholders.

Each of these individuals submits an affidavit regarding the wide-spread reliance in the industry on the previous practice and law in formation of business entities for A/E firms. Four of the affidavits are specific to major firms, each of which incorporated after 1963 and relied on the former law and advice of counsel in filing under the BCA. Each currently has non-licensed shareholders. The Court should be fully aware of the real life and current affect **Miller** is having upon a substantial number of persons and firms in Michigan.

II(b) THE IMPACT OF APPLYING **MILLER** RETROACTIVELY IS DETRIMENTAL TO THE INDUSTRY AND WOULD WORK AN INJUSTICE

Appellant Allstate makes light of the “dire” predictions concerning the *potential* effect of the **Miller** decision. Amici do not see the dire consequences as mere “predictions” but believe the unintended consequences of **Miller** constitute current reality. Pursuant to the **Miller** decision, all Michigan A/E firms formed under the BCA are currently subject to the reality they are existing and practicing “illegally.” Those non-licensed shareholders are also holding shares “illegally.” These firms may be required to re-incorporate and divest persons with vested ownership interests working a severe injustice. Further, firms may also be exposed to liability for breaching covenants to maintain their operations in conformance with state law. The prospect for enterprising attorneys to construct claims and defenses adverse to A/E’s based on **Miller** is hardly speculation, since **Miller** itself

reflects the possibilities available to litigants.

In general, **Miller** has detrimentally impacted the industry. A/E's may no longer choose the form under the BCA, and may be forced to re-incorporate, putting some Michigan firms at a competitive disadvantage regarding recruitment. Architecture and engineering are complex endeavors that require for success an array of talented associates, not just licensees. Without the ability to offer shares in Michigan firms, many of Michigan's most talented practitioners of the associated arts and sciences will seek careers in other states, or with firms formed in Michigan prior to 1963.

II(c) THE COURT SHOULD HOLD **MILLER** TO ITS FACTS, AND/OR GIVE THE DECISION PROSPECTIVE APPLICATION ONLY

As discussed in Argument Section I, Amici urge the Court to reverse **Miller** outright. However, in the alternative, if the Court affirms **Miller** as to physical therapists or medical providers, there is no basis to extend that ruling beyond the professions represented before the Court in the instant adversarial proceeding. Clearly, there are many aspects of A/E practice, including the associated regulatory law and history, that bear on the question of whether all professions listed in MCL 450.222(c), including A/E's, are required to form exclusively under the PSCA. Since the question was not fully explored and the consequences are severe, it would be appropriate to hold **Miller** to its particular facts.

Prospective application would also be appropriate. As a general rule, judicial decision are given complete retroactive effect. **Lincoln v. General Motors Corp.**, 231 Mich. App. 262, 586 N.W. 2d 241 (1998) (judgment aff'd, 461 Mich. 483, 607 N.W.2d 73 (2000)). However, prospective application is preferred over full or limited retroactive

application when overruling settled precedent. ***Lindsey v Harper Hosp***, 455 Mich. 56, 68; 564 N.W.2d 861 (1997); ***Devillers v. Auto Club Ins. Ass’n***, 473 Mich. 562, 702 N.W.2d 539 (2005).

The Court has stated that the threshold question in determining whether a decision should apply prospectively is whether “the decision clearly established a new principle of law.” ***Riley v Northland Geriatric Center (After Remand)***, 431 Mich. 632, 645-646; 433 N.W.2d 787 (1988). In this case, there have been no previous judicial decisions on the issue of whether A/E’s may incorporate under the BCA so there is no occasion to overrule a previous judicial decision. However, the rule announced in ***Miller*** in fact overrules 45 years of practice and stability in the law, which was widely considered settled, and which was based on statutory authority, **MCL 338.567**. Accordingly, due to the long-established practice in Michigan, Amici pray the Court find the ***Miller*** rule to be a “new rule of law” for purposes of prospective application.

Factors that the court considers when determining whether to give a decision which announces a new rule of law retroactive or prospective application are (1) the purpose of the new rule, (2) the extent of reliance on the old rule, and (3) the effect that full retroactive application would have on the administration of justice. ***Lesner v. Liquid Disposal, Inc.***, 466 Mich. 95, 643 N.W.2d 553 (2002). (1) The new rule serves no purpose as to A/E’s, as stated above, because A/E practice is regulated under the Occupational Code. (2) the extent of reliance has been wide spread and very long (45 years). The affidavits filed in support with this brief reflect but a small sample of the firms that are affected by ***Miller***. (3) full retroactive application would extend to all firms incorporated or re-incorporated under

the BCA since 1963. The divestment of vested interests, industry-wide exposure to liability and the costs of re-incorporation for firms throughout the state cannot serve the administration of justice in Michigan. All the factors weigh heavily in favor of strictly prospective application of **Miller**.

CONCLUSION

Amici urge the Court to reverse the **Miller** Court and find, consistent with the both the plain words of the statute and the clear intent of the Legislature, that all “professional services” listed in **MCL 450.222(c)** are not required to form under the PSCA but may also form under the BCA, because the PSCA does permit such formation. Further, for this same reason, Plaintiff/Appellee PT Works was lawfully incorporated under the Michigan Business Corporation Act. In the alternative, Amici urge the Court consider the vast unintended consequences of affirming **Miller**, and exercise its discretion to limit application of this new rule of law. Amici pray the Court, at minimum, limit the **Miller** decision to its facts and/or limit the effect of the decision to prospective application.

Respectfully submitted,

KERANEN & ASSOCIATES, P.C.



By: Gary D. Quesada (P48268)

Attorneys for Amicus Curiae

AIA Michigan, ACEC Michigan & MSPE

6895 Telegraph Road

Bloomfield Hills, MI 48301

(248) 647-9653

Date: April 7, 2008

EXHIBIT A

AFFIDAVIT OF RONALD W. BRENKE, P.E.

STATE OF MICHIGAN)
)SS
COUNTY OF LIVINGSTON)

I, Ronald W. Brenke, P.E., being duly sworn states:

1. I do hereby certify, affirm or swear that I am competent to testify based on personal knowledge that the following facts are true and accurate to the best of my information and belief.
2. I am the Executive Director/Secretary for the American Council of Engineering Companies of Michigan ("ACECMI"). ACECMI is the state affiliate of the American Council of Engineering Companies ("ACEC"), a national organization of more than 5,500 engineering firms throughout the United States. ACEC seeks to advance the engineering profession and serves as the voice of America's engineering industry. ACECMI's mission is to improve the quality of life for Michigan citizens insofar as they are affected by public and private engineering projects.
3. ACECMI's member firms provide professional engineering services. Many of ACECMI's members provide both architectural and engineering services. ACECMI has historically been active in promoting compliance with Michigan licensing laws, and ACECMI regularly assists its members regarding compliance inquiries.
4. I have served as Executive Director since 2003. My routine duties include gathering and receiving data and information from ACECMI's member companies. Such data and information includes facts relative to issues that impact the practice of engineering in Michigan. This information is collected for the purpose of reporting to my ACECMI Board of Directors and to the national ACEC organization, for review, analysis and action if appropriate.
5. Through the foregoing process, I have become familiar with the following facts: A very significant number of ACECMI members that provide professional engineering and/or architectural services in Michigan are currently incorporated under the Michigan Business Corporation Act ("MBCA") rather than the Professional Service Corporation Act ("PSCA"). Further, many of the firms incorporated under the MBCA have non-licensee shareholders. These firms are both large and small, and are located throughout the state.

6. The Michigan engineering firms currently incorporated under the MBCA with non-licensee shareholders consulted with legal counsel at the time of incorporation (or re-incorporation) and relied on counsel's advice that A/E firms may incorporate under *either* the MBCA or the PSCA. ACECMI's members have acted in conformance with the industry standards that were prevailing at the time of their business incorporation actions.

Further deponent sayeth not.

Dated: 4-3-08

Ronald W. Brenke

Ronald W. Brenke, P.E.

Executive Director/Secretary of ACEC of Michigan

STATE OF MICHIGAN)
)ss.
COUNTY OF LIVINGSTON)

Subscribed and sworn to before me on
the 3rd day of APRIL, 2008
by Ronald W. Brenke, P.E., who is
personally known to me.

GARY D QUESADA
GARY D QUESADA, Notary Public

OAKLAND County, MI.

Acting in Livingston County, MI

My Commission Expires: 4/30/13

AFFIDAVIT OF STEPHEN SMITH, AIA.

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

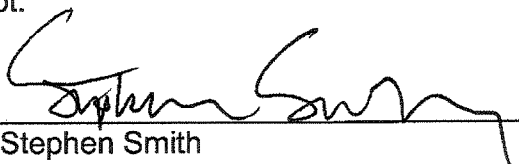
I, **Stephen Smith, AIA.**, being duly sworn states:

1. I do hereby certify, affirm or swear that I am competent to testify based on personal knowledge that the following facts are true and accurate to the best of my information and belief.
2. I am the 2007-2008 President of the American Institute of Architects, Michigan Chapter ("AIAMI"). AIAMI is the state affiliate of the American Institute of Architects ("AIA"), a national organization of more than 83,500 members throughout the United States. AIA seeks to advance the architectural profession and serves as the voice of America's architectural industry. AIAMI has over 1,600 members within 10 sub-chapters which serve the entire state. AIAMI's mission is to improve the quality of life for Michigan citizens, insofar as they are affected by the built environment.
3. AIAMI's licensee members provide architectural services. AIAMI has historically been active in promoting compliance with Michigan licensing laws, and AIAMI regularly assists its members regarding compliance inquiries.
4. As the current AIAMI President, my duties include gathering and receiving data and information from AIAMI's members related to issues affecting the practice of architecture in Michigan. This information is collected for the purpose of reporting to my AIAMI Board of Directors, to the appropriate committees and to the national AIA organization for review, analysis and action if appropriate.
5. Through the foregoing process, I have become familiar with the following facts: A very significant number of firms providing architectural services in Michigan are currently incorporated under the Michigan Business Corporation Act ("MBCA") rather than the Professional Service Corporation Act ("PSCA"). Further, many of the firms incorporated under the MBCA have non-licensee shareholders. These firms are both large and small, and are located throughout the state.

6. The Michigan architectural firms currently incorporated under the MBCA with non-licensee shareholders consulted with legal counsel at the time of incorporation (or re-incorporation) and relied on counsel's advice that A/E firms may incorporate under *either* the MBCA or the PSCA. AIAMI's members have acted in conformance with the industry standards that were prevailing at the time of their business incorporation actions.

Further deponent sayeth not.

Dated: 4/3/2008



Stephen Smith
President of AIA Michigan

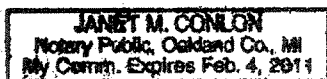
STATE OF MICHIGAN)
)ss.
COUNTY OF OAKLAND)

Subscribed and sworn to before me on
the 3rd day of April, 2008
by Stephen Smith., who is
personally known to me.



, Notary Public

Oakland County, MI.
Acting in Oakland County, MI.
My Commission Expires: 2-4-2011



AFFIDAVIT OF James W. Page

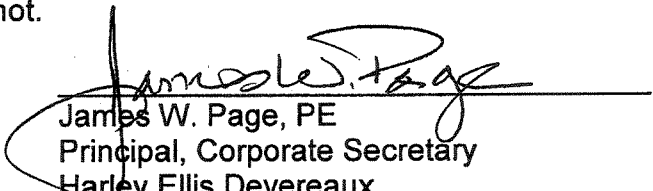
STATE OF MICHIGAN
COUNTY OF Oakland

I, James W. Page, P.E., being duly sworn states:

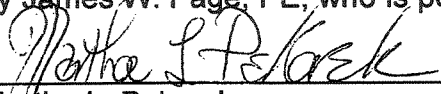
1. I do hereby certify, affirm or swear that I am competent to testify based on personal knowledge that the following facts are true and accurate to the best of my information and belief.
2. I am the Corporate Secretary for Harley Ellis Devereaux Corporation. Harley Ellis Devereaux provides architectural and engineering services in Michigan, and is a member of ACEC of Michigan. Our firm has over 450 employees and 120 shareholders.
3. This firm always consults with legal counsel regarding matters of business formation. When this firm incorporated in 1986 counsel advised us that Michigan law allowed an architectural/engineering firm to incorporate under either the Michigan Business Corporation Act ("MBCA") or the Professional Service Corporation Act ("PSCA"). We relied upon the legal advice we received, and incorporated under the MBCA.
4. As allowed under the provisions of the MBCA, Harley Ellis Devereaux currently has 25 understood that as long as 2/3 of our principals are licensees, our corporate structure complies with Michigan law.
5. This firm complies with "the 2/3 rule," because at least 2/3 of our principals are licensees.

Further Affiant sayeth not.

Dated: April 4, 2008


James W. Page, PE
Principal, Corporate Secretary
Harley Ellis Devereaux

Subscribed and sworn to before me on the 4th day of April, 2008
by James W. Page, PE, who is personally known to me.


Martha L. Pekarek
Notary Public, Oakland County, MI.
Acting in Oakland County, MI.
My Commission Expires: September 1, 2008

AFFIDAVIT OF JAMES A. SUSAN

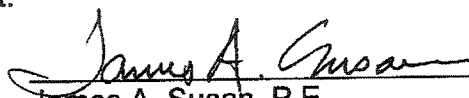
STATE OF MICHIGAN)
)SS
COUNTY OF KENT

I, James A. Susan, P.E., being duly sworn states:

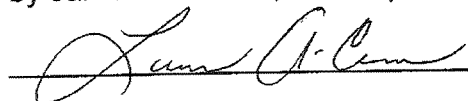
1. I do hereby certify, affirm or swear that I am competent to testify based on personal knowledge that the following facts are true and accurate to the best of my information and belief.
2. I am the Senior Vice President for Fishbeck, Thompson, Carr & Huber, Inc. Fishbeck, Thompson, Carr & Huber, Inc. provides architectural and engineering services in Michigan, and is a member of ACEC of Michigan. Our firm has over 340 employees and 190 shareholders.
3. This firm always consults with legal counsel regarding matters of business formation. When this firm incorporated in 1967 counsel advised us that Michigan law allowed an architectural/engineering firm to incorporate under either the Michigan Business Corporation Act ("MBCA") or the Professional Service Corporation Act ("PSCA"). We relied upon the legal advice we received, and incorporated under the MBCA.
4. As allowed under the provisions of the MBCA, Fishbeck, Thompson, Carr & Huber, Inc. currently has shareholders that are not licensed as architects or engineers. We have always understood that as long as 2/3 of our principals are licensees, our corporate structure complies with Michigan law.
5. This firm complies with "the 2/3 rule," because at least 2/3 of our principles are licensees.

Further Affiant sayeth not.

Dated: 4/4/08


James A. Susan, P.E.
Senior Vice President
Fishbeck, Thompson, Carr & Huber, Inc.

Subscribed and sworn to before me on the 4th day of April, 2008
by James A. Susan, who is personally known to me.


_____, Notary Public
_____, County, MI.
Acting in _____ County, MI.
My Commission Expires: _____

LAURA A. CARSON Notary Public, State of Michigan County of Kent My Commission Expires Mar 27 2014 Acting in the County of <u>Kent</u>


STATE OF MICHIGAN)
COUNTY OF Wayne)SS

1. I do hereby certify, affirm or swear that I am competent to testify based on personal knowledge that the following facts are true and accurate to the best of my information and belief.
2. I am the President and Chairman of the Board for Soil and Materials Engineers, Inc. (SME). SME provides engineering services in Michigan and is a member of ACEC of Michigan. SME has over 200 employees and 71 shareholders.
3. This Corporation historically consults with and relies on legal counsel regarding matters of business formation. The original incorporation documents prepared and filed by our counsel in 1964 chose to incorporate our architectural/engineering firm under the Michigan Business Corporation Act ("MBCA") and not the 1962 (effective 1963) Professional Service Corporation Act ("PSCA").
4. As allowed under the provisions of the MBCA and the Michigan Occupational Code, SME currently has shareholders and principals who are not licensed as engineers. We have continued to receive counsel advice that, as long as 2/3rds of our principals (officers and directors) are licensees (under requirements of Michigan's Occupational Code), our corporate structure complies with Michigan law. This firm complies with "the 2/3rds rule," because at least 2/3rds of our principals are licensees.

Dated: April 4, 2008

Subscribed and sworn to before me on the 4th day of April, 2008
by Mark K. Kramer, President and Chairman of the Board of Directors of Soil and Materials
Engineers, Inc., who is personally known to me.

Engineers, Inc., who is personally known to me.



Julie Green, Notary Public
Wayne County, MI.
Acting in Wayne County, MI.
My Commission Expires: October 11, 2013

JULIE GREEN
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Oct 11, 2018
ACTING IN COUNTY OF *Wayne*

AFFIDAVIT OF LAWRENCE J FLEIS, P.E.

STATE OF MICHIGAN)
)SS
COUNTY OF KENT)

I, Lawrence J. Fleis, P.E. being duly sworn states:

1. I do hereby certify, affirm or swear that I am competent to testify based on personal knowledge that the following facts are true and accurate to the best of my information and belief.
2. I am the President for Fleis & VandenBrink Engineering, Inc. that provides architectural and engineering services in Michigan, and is a member of ACEC of Michigan. Our firm has over 100 employees and 43 shareholders.
3. This firm always consults with legal counsel regarding matters of business formation. When this firm incorporated in 1993, counsel advised us that Michigan law allowed an architectural/engineering firm to incorporate under either the Michigan Business Corporation Act ("MBCA") or the Professional Service Corporation Act ("PSCA"). We relied upon the legal advice we received, and incorporated under the MBCA.
4. As allowed under the provisions of the MBCA, Fleis & VandenBrink Engineering, Inc. currently has shareholders that are not licensed as architects or engineers. We have always understood that as long as 2/3 of our principals are licensees, our corporate structure complies with Michigan law.
5. This firm complies with "the 2/3 rule," because at least 2/3 of our principals are licensees.

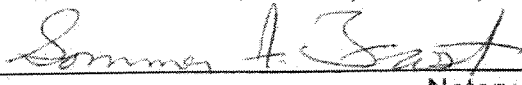
Further Affiant sayeth not.

Dated: 4/4/08



Lawrence J. Fleis, P.E.
President, Fleis & VandenBrink Engineering, Inc.

Subscribed and sworn to before me on the 4 day of April, 2008
by Lawrence J. Fleis, who is personally known to me.



Kent, Notary Public
County, MI.
Acting in Kent County, MI.
My Commission Expires: 10/22/08

SOMMER A. FROST
Notary Public, State of Michigan
County of Kent
My Commission Expires Oct. 22, 2008
Acting in the County of Kent